United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

NO. 74-1292

B
P/S

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, APPELLEE

v.

CONSTANCE ROGERS, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FROM THE EASTERN DISTRICT OF NEW YORK
HONORABLE ORRIN G. JUDD, JUDGE, PRESIDING

BRIEF FOR APPELLEE

HENRY E. PETERSEN,
Assistant Attorney General,

EDWARD J. BOYD,
United States Attorney

SHIRLEY BACCUS-LOBEL
KIRBY PATTERSON
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:

cases--continued

cases--continued

Statutes and Rules Involved:

Miscellaneous:

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-1292

UNITED STATES OF AMERICA, APPELLEE

v.

CONSTANCE ROGERS, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FROM THE EASTERN DISTRICT OF NEW YORK
HONORABLE ORRIN G. JUDD, JUDGE, PRESIDING

BRIEF FOR APPELLEE

ISSUES PRESENTED

1. Whether the evidence sustained defendant's conviction under count one of the indictment.

2. Whether the trial court properly ruled that defendant had waived any objection on venue grounds with respect to counts two and three.

3. Whether the motion for mistrial, made after the charge to the jury, was properly denied.

STATEMENT

Count One of an indictment returned in the United States District Court for the Eastern District of New York charged that

on March 21, 1973, defendant knowingly made false statements and writings as to a material matter within the jurisdiction of the Internal Revenue Service in that, at Branch 29 of the OTB Corporation, 95-98 Queens Boulevard, Queens, New York, she falsely represented that her name was Annette Lehman in cashing winning Superfecta tickets, in violation of 18 U.S.C. 1101.[1/] Count Two alleged a similar offense on April 2, 1973, at Branch 22 of the OTB Corporation, 1501 Broadway, New York City, the false representation being that defendant's name was Mary Grannum. Count Three was identical with Count Two, except that the date of the offense was April 4, 1973. Defendant was convicted as charged. On Janaury 31, 1974, she was sentenced on Count One to imprisonment for a year and day and received a fine of $5,000. Sentences of imprisonment for two years were imposed on Counts Two and Three, to be concurrent with each other and with the sentence on Count One (App. 1-3, 594-595). This appeal followed.

I

GOVERNMENT EVIDENCE ON COUNT ONE
(TRANSACTION OF MARCH 21, 1973)

On March 21, 1973, defendant came to Branch 29, Rego Park, of the Off-Track Betting Corporation in Queens. She presented a

---

1/ The New York City Off-Track Betting Corporation was created June 11, 1971. McKinney, Unconsolidated Laws §8084. Defendant explained that the Superfecta "consists of eight horses and... you have to pick the horses to finish first, second, third and fourth in a certain order. The ticket will cost you two dollars at one racetrack or three dollars at another racetrack" (403).

ticket showing her to be a winner of the Superfecta, which paid $1,421.70 (App. 113-114). Where the odds are better than 299 to 1, that is to say, when there is a payment of $600 or more on a two-dollar ticket or $900 on a three-dollar ticket, it is required that the payee give information and sign an IRS information form 1099. The original of the form is given to the payee-customer. Three carbon copies are sent to the OTB Central Offices, at 1501 Broadway in Times Square. The OTB retains Copy B, the full copy as executed before payment on the ticket is made, sending two copies of the top half of the form to the state tax authorities, who retain one copy and forward the remaining copy to the Internal Revenue Service.

Rosylin Friedman Supervisor at the branch, knew the defendant as "Annette". From information given her by defendant, she filled out Form 1099, showing on the top half of the form which was forwarded to the tax authorities the customer-payee as Annette Lehman, 95-13 Horace Harding Expressway, Flushing, New York, social security number 534-20-4836, amount of proceeds $1,421.70, OTB Branch Number 03029, date of event 3/20/73, date cashed 3/21/73, and the ticket number. On the lower half of the form, retained by the OTB, the identification submitted was listed as a driver's license, without noting the license number, and the social security card. The form states:

> I certify that I am the true owner of the ticekt(s) presented and have submitted my true personal identification in support of the above disbursement to me. I understand that this information is for the Internal Revenue Service and my misrepresentation or false statement made herein is a violation of Section 7206(2), Title 26 U.S. Code which carries a maximum penalty of $5,000 fine or three (3) years in prison or both.

This is followed by the signatures of "Annette Lehman" and OTB Representative "Rosylin Friedman" (App. 113-118, 214-216, 152; Govt. Exh. 1, appended to this brief).

II

GOVERNMENT EVIDENCE ON COUNTS TWO AND THREE (TRANSACTIONS OF APRIL 2 AND 4, 1973)

On April 2, 1973, defendant came to Branch 22 of the OTB on Forty-Third Street and Broadway with winning tickets on the Superfecta for March 31, which winnings amounted to $18,048.60. Defendant Submitted to cashier Michael Sullivan a social security card and driver's license, both in the name of "Mary Grannum". Sullivan summoned assistant manager Sam Rosen, who filled out the Form 1099 (App. 168-171, 233-241). OTB rules forbid issuance of checks in an amount exceeding $10,000 (App. 218-220, 247, 271). Pursuant to arrangements made with the Chemical Bank, which carries the OTB account, the two checks were made payable to Cash. The stub of the checks showed that they were paid to Mary Grannum, address 129 West First Street, New Jersey, in amounts respectively of $10,000 and $8,048.60 (App. 318). The form 1099 showed the customer-payee as Mary D. Grannum, 129 West 1st Street, Roselle, New Jersey, social security number 153-34-9262, amount of proceeds $18,048.60, OTB Branch Number 01022, date of event March 21, 1973, date cashed April 2, 1973, and the ticket numbers. The lower half of the form showed the identification submitted as a driver's license, the number of which was noted, social security card, and a Saks Fifth Avenue Credit Card with the account number. It contained a certificate of ownership of the tickets (supra, p. 3) followed by the signatures of "Mary Grannum" and OTB Representative

"S. Rosen" (Govt. Exh. 3, appended to this brief).

On April 4, 1973, defendant returned to Branch 22 with winning tickets on the Superfecta for the previous day, which aggregated $37,876.80. Following a procedure similar to that on April 2, checks were issued payable to cash, but the stubs showing that they were delivered to "Mary D. Grannum". Three of the checks were for $10,000 and a fourth was in the amount of $7,876.80 (App. 168, 170, 264, 318-320).

Witness Mary D. Grannum testified that she resided at 129 West First Avenue, Roselle, New Jersey, and that her social security number was 153-34-9662. She further testified that about December 18 or 19, 1972, her wallet, which contained her social security card and her driver's license, was stolen from her. At no time did she ever cash a Superfecta ticket (App. 196-197).

III

DEFENSE TESTIMONY

Defendant testified that she was married in 1958 to Donald Lehman. Following her divorce she was married in 1960 to Ted Rodgers. Defendant testified that she had been convicted in Pennsylvania of possessing pornographic literature, which conviction was pending on appeal. She decided to leave Pennsylvania because of the notoriety and took an apartment in Queens in the name of Connie Rodgers. She explained, "I got an identification under Annette Leham, Annette my middle name and Lehman my first married name, to re-establish credit for myself in New York" (App. 397-400). However, she was not known to anyone as "Annette" (App. 407).

Defendant testified that on March 21, 1973, she cashed a winning ticket on the Superfecta at the OTB branch on Queens Boulevard, a place she frequented daily. She told OTB employee Phil Nelson, an acquaintance who knew her as Connie Rodgers, that she had lost her identification; but that she had another identification allegedly a social security card bearing the name Annette Lehman and her actual social security number. She asked him to cash the tickets and he agreed.[2/] She signed the form and received the cash (App. 404-405). Defendant further testified that she had not seen Rosylin Friedman at the OTB office on March 21 (App. 405). She stated that her social security number was 161-30-5848. The number on Government Exhibit (the 1099 form executed on March 21) which purported to be her social security number was 534-20-4836. This number, handwritten on the social security card defendant introduced into evidence and claimed to have submitted as identification on March 21st, was a number on a combination safe which she still possessed (App. 406-407).

Defendant further testified that she cashed Superfecta tickets on April 2, 4, and 5. On the evening of April 1, Joseph Pullman, nicknamed "the Bear", a long-standing friend of her boy friend, Forrest Gerry, and herself, visited them at their apart-

---

2/ According to Nelson, he did cash a ticket for the defendant sometime during the month of March, but she did not present to him identification giving the name "Annette Lehman" (App. 352-353). Defendant claimed never to have asked a ticket at this office except on March 21 (App. 408-409).

ment. Pullman said that he had a bunch of Superfecta tickets and identification which belonged to his girl friend, Mary Grannum, who was in the hospital. He had too many things to do on the next day and asked defendant as a favor to cash them. He directed defendant to go to "Broadway, 1500, whatever it is, in Manhattan, the big office, main office, and ask for Sam in there" (App. 411-413).

She went to the OTB branch the next day and asked for Sam. When Rosen was free, he told defendant she should sign a 1099-Form. She informed him that the identification she had presented was not hers. She explained, "Sam, this isn't my I.D. The Bear sent me here today and asked me to get this cashed for his girlfriend who is hospitalized. At this time if you want me to I will sign my name on it, which I would prefer." He said that she should sign Mary Grannum's name and that he was sure that it was all right. She so signed, following which they took the checks and went upstairs to the bank and got the cash (App. 413-415). She gave the money and the I.D. to Pullman that night at the race track. Pullman thanked her and said that Mary would be grateful (App. 416).

On the morning of April 4, according to defendant's testimony, Pullman came to her apartment again with tickets and the same I.D. He said that Mary was still hospitalized and that he had to get a station wagon for him and Forrest Gerry to drive to Maine that night and that there was no way for him to cash the tickets. Defendant said that she agreed to cash them and received checks at the branch, which she cashed upstairs at the Chemical Bank. She gave the money and the identification to Pullman at

her apartment that afternoon (App. 416-418).

Defendant further testified that on April 5 she helped Pullman to make bets. Pullman had 65 winning tickets on the Superfecta and she had seven, each paying $803, a total of approximately $57,000. Since the tickets were under $900, it was not necessary to sign the 1099's. Gerry and the Bear were driving to Maine, so defendant cashed the tickets for both. She collected three checks of $10,000 each and about $27,000 in cash. She gave the checks and the cash to Pullman at the race track that night, keeping about $5,000 for herself (App. 418-423). Defendant testified that she had won no other Superfectas, but had lost many times, she also stated that she had been dispossessed for non-payment of her apartment rent in June 1973 (App. 423-425).

On cross-examination, defendant read aloud the statement which she was required to sign for each 1099 (App. 440-441). Defendant stated that she had never before read this on a Form 1099 (App. 441). She also testified that she had never used the name "Constance Baker" in cashing Superfecta tickets (App. 443). She was unable to explain how her name, address and social security number got on another Form 1099, dated March 23, 1973, which showed "Annette Lehman", social security number 534-20-4336, 95-B Horace Harding Expressway, Flushing, New York, as winning $28,602.00 on March 22, 1973 (App. 437-438; Govt. Exh. 12).

There was also testimony by Phillip Nelson, a former acting manager of the OTB Rego Park Office, Branch 29 (App. 333-359), as well as brief testimony by Joseph Pullman, who invoked his Fifth Amendment privilege (App. 454-457).

IV

REBUTTAL TESTIMONY

Joan Siegel, assistant manager Branch 64, Elmhurst, testified that in April 1973, defendant cashed 72 or 73 tickets aggregating approximately $56,000, exhibiting identification as "Constance Baker". It was decided, however, that she did not have to execute a Form 1099, as the tickets were each for less than $900 (App. 460-464). The court also admitted as relevant, although not binding on defendant, the testimony of a former OTB employee, Ira Udell, that he, acting in league with Forrest Gerry who was using an assumed name, had cashed tickets for Gerry who had presented identification in the name of "Annette Lehman" (App. 483-495; Gov't. Exh. 12).

V

MOTION FOR MISTRIAL

At the conclusion of the court's charge, the following took place (App. 564-565):

> MR. BOBICK: Your Honor, at this time-- and it was only when listening to your charge, that I realized that I must move for the withdrawal of a juror and a declaration of a mistrial.
>
> The Court has no jurisdiction. Counts two and three did not occur in the Eastern District but in the Southern District. 1501 Broadway is Manhattan, in the Southern District of New York.
>
> MR. MEYERSON: No, that is in Elmhurst.
>
> MR. BOBICK: No, it is in Manhattan.
>
> THE COURT: 1501 Broadway--
>
> MR. BOBICK: 42nd Street, Manhattan. That is not the Eastern District but the Southern District in New York, and it has no business being here. If the jury heard evidence on a count not within the jurisdiction of the Court, it cannot come to a determination.

I move for the withdrawal of a juror and declaration of a mistrial.

MR. MEYERSON: It states the address and it gives notice of venue.

The law is clear in this Circuit, as well as in any other Circuit that venue is waivable as soon as there is notice of it, and there is notice in counts two and three.

MR. BOBICK: 1501 Broadway, New York. That is the Eastern District as well as the Southern District.

At this point, we never waived venue. I didn't realize it until such time as the Court read the indictment, saying "In the Eastern District of New York."

THE COURT: I may let the jury decide it and consider the motions at the end.

Any exceptions to the charge, Mr. Meyerson?

MR. MEYERSON: No, your Honor.

THE COURT: Have you any exceptions, Mr. Bobick? You don't want this defendant to be tried twice?

MR. BOBICK: If I could try this, here in the Eastern District with Annette Lehman, and I can go back and try the second one, I am willing.

THE COURT: If you tried Annette Lehman, Mr. Meyerson could bring the others in as similar acts.

You may be better off this way, they may compromise and acquit on count one and convict on counts two and three, and I will hear argument as to whether or not I should dismiss.

Have you any exceptions to the charge as given?

MR. BOBICK: No, your Honor.

On the following day, January 31, the jury still being out, Mr. Bobick stated (App. 571):

I would like to withdraw the motion for a mistrial previously made at the end of the Judge's charge. I would like to at this time move for a directed verdict of acquittal on Counts Two and Three. The reasons I'll go into in a moment, and for a mistrial on Count Number One.

After the jury brought in its verdict, the following colloquy took place (App. 584-585):

> MR. BOBICK: * * * Until such time as I raised the argument, true, learned counsel, Mr. Meyerson, and the Honorable Court and myself, were completely in error as to the fact where 1501 Broadway was. We heard the testimony--
>
> THE COURT: I never contemplated it was-- I do not think you contemplated it was anywhere but 42nd Street.
>
> MR. BOBICK: I contemplated, your Honor, that it was in the Eastern District and the Court had jurisdiction, and the Court didn't have jurisdiction. I think that the Court recognized that it didn't have jurisdiction.
>
> The situation very simply was that during the entire indictment, the indictment alleged it happened in the City of New York, which encumbers-- encompasses not only the Eastern District but the Southern District as well.
>
> It could very easily have been in the Eastern District, and I don't think that the fact where it occurred, occurred to either the Court, Mr. Meyerson or myself, until the Court started its charge, is when it occurred to me first.
>
> THE COURT: All right. Motion denied. United States against Jones, 162 F. 2d 73, so ordered.

ARGUMENT

I. THE EVIDENCE SUSTAINED COUNT ONE OF THE INDICTMENT.

During presentation of the government evidence, the real contested issue was the identity of the female who appeared at Branch 29 of the OTB Corporation on March 21, 1973, and at Branch 22 on April 2 and 4 and presented these tickets which had brought her such phenomenal luck in this short period of time (App. 3-63, 115, 163-165, 174-176, 235-241, 285, 290, 302).

However, this issue was removed when defendant took the stand and testified that she was the lady in question. Her explanation was that, in order to establish her credit in New York after difficulties which she had suffered in Pennsylvania, she had

combined her middle name Annette, with her former married name, Lehman; in cashing her ticket on March 21, she had allegedly presented to the OTB employee, a social security card bearing the name "Annette Lehman" and her real social security number, 161-30-5848. The Form 1099, however, reflected social security number 534-20-4836. She testified that these numbers represented the combination to a safe which she possessed, which numbers she had noted for conveience on the face of her social security card. According to the defense theory (App. 509-510) this discrepancy was the fault of the OTB employee, who had mistaken the handwritten numbers on the card for her official social security number.

This strained explanation of otherwise incriminating circumstances was rejected by the jury with ample justification. The evidence justified an inference that defendant presented a social security card which bore a name and social security number assumed by defendant to disguise her identity. The jury was certainly entitled to conclude that any trained OTB employee who was acting in good faith could not fail to distinguish between handwritten figures appearing on the face of the card presented and the printed figures which designate the true social security numbers and therefore the true identity of the bearer. Moreover, the "Annette Lehman" identification had been used on the other occasions by defendant's boyfriend, allegedly without her knowledge. On at least one of these occasions another Form 1099, in the name of "Annette Lehman" again bearing the incorrect social security number was executed. It truly strains credibility to

assume that this very foolish error occurred more than once. Indeed, the reasonable explanation of the discrepancy between defendant's real social security number and that noted on the Form 1099, and the one which the jury accepted, was that defendant had presented a fraudulent social security card bearing her middle name and a former married name as well as a false social security number for the express purpose of concealing her identity in order to avoid the tax consequences as well as the possiblity of triggering an investigation of her unusually large winnings. This sound conclusion with respect to defendant's intent becomes virtually inescapable when the evidence of defendant's course of conduct in this regard , that is, the use on several occasions of false identification in cashing racing tickets, is considered.

Defendant counters that she could not have concealed a material fact in using the name "Annette Lehman" because she is legally entitled to use any name she chooses "so long as it does not interfere with the rights of others" (Br. 13). Of course, it is precisely her intent in this regard which was the issue. The fact is that her name was not Lehman, though it had once been. The jury concluded, and there was ample basis for its finding, that the social security card was intentionally used for the purpose of concealing a material fact, i.e., her identity.

Thus, defendant's contention that the verdict was against the weight of the evidence, which is not in any event a ground for reversal on appeal is not supported by the record. The weight of evidence and the credibility of witnesses is not a matter with which the appellate court concerns itself. The verdict

of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it. Glasser v. United States, 315 U.S. 60, 80; United States v. Masullo, 489 F.2d 217, 220 (2nd Cir. 1973). Such evidence was amply here provided.

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE DEFENDANT HAD WAIVED THE QUESTION OF VENUE ON COUNTS TWO AND THREE.

The sufficiency of the evidence to sustain these counts is not questioned except as to the question of venue, which the court below held had been waived. There is no question that the government failed to prove venue as to Counts Two and Three. Count One alleged that the events occurred at Branch 29 of the OTB Corporation, 95-28 Queens Boulevard, Queens, New York. Counts Two and Three alleged that the events took place at Branch 22 of the OTB Corporation, 1501 Broadway, New York City. Michael Shagan, an official of the OTB Corporation, testified that the original of a Form 1099 is given to the customer who presents a ticket for payment. "The other three copies are returned to OTB Central Offices at 1501 Broadway in Times Squre" (App. 215). Defendant, testifying as to the directions which "The Bear" gave her as to cashing the tickets for his friend, Mary Grannum, said (App. 412-413):

> He said I should go into Broadway, 1500, whatever it is, in Manhattan, the big office, main office, and ask for Sam in there.

She then testified in detail as to what happened at this location (App. 413-416).

As set out in full, supra, pp. 9-10 , defendant's counsel told the court at the conclusion of the charge that it was only when the court had read the indictment that he realized that 1501 Broadway was in Manhattan. The assistant United States attorney interposed that it was in Elmhurst. Defense counsel corrected him, saying that 1501 Broadway was at 42nd Street in Manhattan (supra, p. 9). Later in the proceedings, counsel sought to assert that all of them including the court had been in error as to where 1501 Broadway was. The court decisively corrected him on this, saying (App. 585, supra p.11):

> I never contemplated it was -- I do not think you contemplated it was anywhere but 42nd Street.

Defense counsel, however, continued to assert that the court, the prosecutor and himself all mistakenly believed that the events were in the Eastern District (App. 585, supra, p. 11). Now, however, defendant contends further that Counts Two and Three were deliberately misleading, "a flagrant attempt to hide the fact that such location is not within the jurisdiction of the trial court" (Def. Br. 5). Obviously this charge is without substance. The confusion of the prosecutor at learning that the OTB branch which he though was located in Elmhurst was another branch located in Manhattan is apparent from the bare record. No possible advantage could accrue to him by trying offenses which had occurred in another district and no advantage to the government is seen or has been suggested by trying such a case on one side of the East River rather than on the other.

The preconception which misguided the prosecutor despite clear evidence which should have alerted him to the mistake does

not, however, necessarily establish like ignorance of the facts on the part of the defense. Counsel, who offices not far from 1501 Broadway in Manhattan, evinced his knowledge of the territory when he immediately told the court, at the conclusion of the charge, that this was at 42nd Street. His client, who surely had recounted these events prior to the trial, was explicit in her testimony that the second and third transactions occurred at "Broadway, 1500, whatever it is, in Manhattan, the big office, the main office" (App. 412, supra, p.7). In a desperate case, where the evidence was so plainly damning, it is virtually inconceivable that this competent attorney never, until the trial was virtually over, awoke to the fact that two out of the three charges related to offenses in his own neighborhood and thus in the Southern rather than the Eastern District of New York. The judge who had all this contact first-hand did not swallow that explanation and there is no reason why this Court should.

Contrary to defendant's contention, the venue requirements of the Constitution do not impose a limitation upon jurisdiction. 3/ Section 3231 of Title 18, United States Code, provides:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

3/ Article III, Section 2, provides, inter alia;

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the

The right to be tried in a district in which the offense was committed, like other rights conferred by Article III, Section 2, is one which can be waived. Patton v. United States, 281 U.S. 276, 298; Hagner v. United States, 54 F. 2d 446, 448 (D.C. Cir. 1932), affirmed, 285 U.S. 427; Mahaffey v. Hudspeth, 128 F.2d 940, 941 (10th Cir. 1942), certiorari denied, 317 U.S. 666; 1 Wright, Federal Practice and Procedure §306; Barber, Venue in Federal Criminal Cases, 42 Tex. L. Rev. 39, 52 (1963). Waiver, of course, is the intentional relinquishment or abandonment of a known right or privilege. Johnson v. Zerbst, 304 U.S. 458, 464.

The trial court here properly held that defendant had waived his objection to venue. The court cited a single case, United States v. Jones, 162 F.2d 72 (2nd Cir. 1947). The indictment there showed on its face the allegedly improper venue. In the instant case the proper venue was only another district within the same state, a circumstance which has been given emphasis in some cases. See, e.g., Harper v. United States, 383 F. 2d 795 (5th Cir. 1967); Bistram v. United States, 253 F. 2d 610 (8th Cir. 1958); Lafoon v. United States, 250 F.2d 958 (5th Cir. 1958) 4/

Footnote 3 continued:

> right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law,* *

See also Rule 18, F.R. Crim. P.

4/ The concern of the framers of the Constitution was with the cherished right to be tried by a jury of the vicinage. See 1 Wright, Federal Practice and Procedure §301. It was in this context that the Supreme Court spoke of the "deep issues of public policy in the light of which legislation must be construed" in United States v. Johnson, 323 U.S. 273, 276, relied upon at page 18 of defendant's brief.

Admittedly the error here was not such as to be a glaring one, escaping the attention of the prosecutor, who was operating under a preconception that this was an OTB branch in Elmhurst. There is a Broadway in Brooklyn, although it is certainly not the Broadway ordinarily referred to as being in New York City. The formal allegation at the commencement of Counts Two and Three, "in the Eastern District of New York", is not too highly significant, a similar allegation being made in Jones, supra, that venue was improperly placed in the Western District of New York. There was sufficient here to put defendant on notice. Counts Two and Three alleged that the events took place "at Branch 22 of the OTB Corporation, 1501 Broadway, New York City", which would certainly indicate to a competent attorney such as Mr. Bobick that the location was in Manhattan. In United States v. Spagnuolo, 168 F. 2d 768, 771 (2d Cir. 1948), this Court held that any error in failing to establish venue was waived by going to trial, stating: "We of course judicially know that 940 St. Nicholas Avenue is in the Borough of Manhattan." Similarly, here, the geographical location of the OTB at 1501 Broadway, New York, was readily ascertainable by reference to a telephone directory as being in the Borough of Manhattan.[5/]

5/ The Manhattan telephone directory shows in its entirety as to the OTB:

OTB 1501 Bway
Exec Office 1501 Bway
Customer Svcs-- All Branches 1501 Bway
Telephone Account Svcs 1501 Bway

If the defense ever had any real doubt as to where "1501 Broadway, New York City," was located, that doubt should have been resolved when the OTB official referred to "OTB Central Offices at 1501 Broadway in Times Square" (supra, p. 3). Defendant gave further emphasis when she testified that "The Bear" directed her to "go into Broadway, 1500, or whatever it is, in Manhattan, the big office, the main office" (supra, p. 7). This was the testimony of defendant herself, answering her counsel's questions on direct examination. The impact of this language could scarcely be lost on her questioner. This Court has indicated, although not expressly held, that there is a duty to make prompt objection when a defect as to venue appears during trial. Michelson v. United States, 165 F. 2d 732, 734 (2d Cir. 1948), certiorari denied, 335 U.S. 469; United States v. Brothman, 191 F.2d 70, 72 (2d Cir. 1951). Defendant's counsel states that he was not aware of the defect until the court read the indictment during the course of the charge. But why was it that he knew immediately that 1501 Broadway was at 42nd Street? Furthermore, this was exactly the same indictment which had been before him since he took the case. If, as claimed, the judge's reading of the indictment gave him notice, it would seem that his own prior reading would have done the same, assuredly when he interviewed his client and when he heard her testify in answer to his questions that this occurred "in Manhattan, the big office, the main office".

This court has ruled repeatedly, in varying circumstances, that failure to make timely objection on grounds of venue constitutes waiver of the objection. United States v. Price, 447 F.

2d 23, 26-28 (2d Cir. 1971); United States v. Fabric Garment Co., 262 F. 2d 631, 641 (2d Cir. 1950); certiorari denied, 359 U.S. 989; United States v. Miller, 246 F. 2d 486, 488 (2d Cir. 1957); United States v. Mills, 165 F. 2d 198, 201 (2d Cir. 1948). And see United States v. Duma, 228 F. Supp. 755, 756 (D.C. S.C. N.Y.). Waiver may be shown by circumstantial, as well as by direct evidence. Jenkins v. United States, 392 F.2d 393 (10th Cir. 1958). In view of all the facts in this case, the finding of the district court that defendant had notice of the improperly alleged venue and thereby waived any objections on venue grounds was justified and should not be disturbed.

III. DEFENDANT'S MOTION FOR A MISTRIAL WAS PROPERLY DENIED.

After arguing that a judgment of acquittal should be entered with respect to Counts Two and Three because of the failure to prove venue in the Eastern District of New York, defendant also argued at the conclusion of the court's charge that a mistrial should be entered with respect to Count One because that conviction was tainted by the evidence introduced with respect to the allegedly invalid Counts Two and Three. However, the court was prompt to point out that the similar conduct of defendant in the Southern District would in any event have been admissible to show intent as to the act in the Eastern District (supra, p. 10).

This, we submit, answers the mistrial contention. Even on the arguendo assumption that defendant was entitled to a judgment of acquittal on Counts Two and Three, there was no prejudice entitling her to a mistrial on Count One, inasmuch as the March

2 and 4 occurrences were so similar in nature and close in time as to be admissible to show intent.[6] Occurrences of similar nature, closely related in time, are admissible to show intent, purpose, and continuous plan or design. Wood v. United States, 16 Peters 342, 360; Buckley v. United States, 45 Howard 240, 259; Michelson v. United States, 335 U.S. 469, 475 n. 8; Umbaugh v. Halto, 486 F.2d 904, 906-907 (8th Cir. 1973). United States v. McCarthy, 473 F. 2d 300, 303 (2d Cir. 1972); United States v. Berlin, 472 F.2d 1002 (2d Cir. 1972); United States v. Warren, 453 F. 2d 738, 745 (2d Cir. 1972), certiorari denied, 406 U.S. 944; United States v. Kaufman, 453 F. 2d 306, 310-311 (2nd Cir. 1971); United States v. Diario, 451 F.2d 21, 23 (2d Cir. 1970), certiorari denied, 405 U.S. 955; United States v. Birrell, 447 F.2d 1168, 1172 (2d Cir. 1971), certiorari denied, 404 U.S. 1025; United States v. Freedman, 445 F.2d 1220, 1223-1224; United States v. Sweig, 441 F.2d 114, 119 (2d Cir. 1971), certiorari denied, 403 U.S. 932; United States v. Rosenstein, 434 F. 2d 640, 641 (2d Cir. 1970), certiorari denied, 401 U.S. 921.[7]

6/ In a separate trial of Count One, defendant would have been entitled to an instruction that the similar acts were to be considered only as to the issue of intent. Such an instruction would have had no significance in this case, however, inasmuch as intent was the sole issue, defendant's act having been admitted.

7/ Defendant also objects to the testimony of OTB employee Ira Udell that he, acting in concert with defendant's boyfriend, Forrest Gerry, cashed for Gerry tickets in the name of "Annette Lehman." This evidence was not, however, introduced as evidence of similar acts on defendants part and the Court below expressly held that the evidence was not binding in the defendant in this respect. Rather, as the Court below properly concluded, this evidence was relevant on the question of defendant's credibilty as it showed

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction should be affirmed.

EDWARD J. BOYD
United States Attorney
Eastern District of New York

SHIRLEY BACCUS-LOBEL
KIRBY PATTERSON
Attorneys,
Department of Justice,
Washington, D.C. 20530.

Footnote 7 continued:

an "illegitimate use of identification she contended[ed] she kept and used innocently" [App. 485-486]. This evidence was particularly relevant in view of the defense theory that the Form 1099 reflected the incorrect social security number because the OTB had accidently copied a handwritten number noted on the card rather than the printed social security number. In view of the fact that the incorrect number appeared as well on another 1099 Form executed by Gerry using the Lehman I.D., this impossible theory became untenable.

CERTIFICATE OF SERVICE

I certify that this 12th day of June, 1974, two copies of the foregoing Appellee's Brief have been mailed by air mail to Bobick, Deutsch and Schlesser, Attorneys at Law, 149 West 72nd Street, New York, New York 10023, Attorneys for Appellant.

Kirby Patterson

KIRBY PATTERSON, Attorney

GPO 862-508 PO CM-7